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CEDRIC WONG KING TI v. SHIM YEN LIN

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
RAVINTHRAN PARAMAGURU JCA
GHAZALI CHA JCA
B [CIVIL APPEAL NO: S-02(IM)(NCVC)-888-04-2021]
30 APRIL 2023

Abstract – *A Justice of the Peace ('JP') in Sabah is deemed to be a Second Class Magistrate for the limited purpose of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 only. There is no provision in any law that deems a JP is also an Assistant Registrar of the Subordinate Courts. Therefore, a JP in Sabah cannot attest affidavits for general use in civil proceedings unless specially authorised by law.*

CIVIL PROCEDURE: *Affidavits – Attestation – Attestation of affidavit for general use in civil proceedings – Whether Justice of the Peace in Sabah has power to attest affidavits – Courts of Judicature Act 1964, s. 11 – Subordinate Courts Act 1948, s. 2 – Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2*

The appellant and the respondent entered into an agreement to invest in a joint venture project involving prawn-farming. A company was set up as the joint venture vehicle where the appellant and the respondent each held 51% and 49% of shares, respectively. The company managed to obtain endorsement and funding for the project from a governmental body, *ie*, the Sabah Foundation. Subsequently, the respondent commenced an action against the appellant, at the High Court, for fraudulently setting up another company to enter into an agreement with a subsidiary of Sabah Foundation. The High Court found the appellant liable for breach of contract and fraudulent concealment and ordered damages to be assessed. The decision of the High Court was affirmed by the Court of Appeal and the Federal Court. Pending the assessment of damages, the respondent filed for a post-judgment *Mareva* injunction on *ex parte* basis, seeking an order that the appellant must not remove, from Malaysia, any of his assets up to the value of RM30 million and, in any way, dispose of or deal with the same to diminish its value ('encl. 140'). The prohibition sought extended to monies in banks, real estate and shares in companies. The respondent also applied for disclosure of details of the assets and liabilities of the appellant in aid of the *Mareva* injunction. The Judicial Commissioner ('JC') heard the *ex parte* application in encl. 140 and granted the *ex parte Mareva* injunction. The appellant filed a notice of application to set aside and discharge the *ex parte* injunction order ('encl. 169'). Enclosure 169 was dismissed. Hence, the present appeal. The main ground of appeal was that the affidavit in support

was not properly affirmed as it was attested before a Justice of the Peace ('JP'). Section 11 of the Courts of Judicature Act 1964 ('CJA') was cited by the JC in finding that a JP in Sabah has the power to attest an affidavit under it for the reasons that (i) he is deemed to be a Second Class Magistrate; and (ii) the definition of 'Registrar' in s. 2 of the Subordinate Courts Act 1948 ('SCA') includes an 'Assistant Registrar'. The issues that arose for determination were, *inter alia*, (i) whether a JP in Sabah could affirm affidavits; and (ii) whether the appeal was academic.

Held (dismissing appeal subject to variation that disclosure of assets be limited to unencumbered assets to tune of RM30 million only)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The JC erred in holding that the JP could avail s. 11 of the CJA to attest an affidavit for general use in civil proceedings. The Fourth Schedule of the SCA enacts that some public officers are, by virtue of office, deemed to be the First Class or Second Class Magistrates. For example, a State Secretary is an *ex officio* First Class Magistrate and an Assistant Registrar of the Subordinate Court is an *ex officio* Second Class Magistrate. However, the Schedule does not state the converse, *ie*, it does not deem that a Second Class Magistrate is also an 'Assistant Registrar'. Therefore, it was wrong to say that, because an Assistant Registrar is an *ex officio* Second Class Magistrate, the latter is also an Assistant Registrar. Furthermore, the meaning of 'Registrar' in s. 11 of the CJA should be discerned from the CJA itself. The CJA limits the meaning to all ranks of Registrars of the Superior Courts only. There is no reference to the Registrars of Subordinate Courts. Even if a JP is deemed to be an Assistant Registrar of the Subordinate Courts, he or she cannot come within the ambit of s. 11(a) of the CJA. A JP in Sabah is deemed to be a Second Class Magistrate for the limited purpose of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 only. There is no provision in any law that deems that a JP is also an Assistant Registrar of the Subordinate Courts. Therefore, a JP in Sabah, who is deemed to be a Second Class Magistrate, cannot attest affidavits for general use in civil proceedings unless specially authorised by law. (paras 19, 20, 22 & 23)

(2) Whilst a JP in Sabah is not authorised to attest an affidavit for use in general civil proceedings, by operation of law, the *ex parte* order in question had lapsed. Therefore, the appeal against the grant of it was academic. It was unnecessary to consider ordering an inquiry into damages because there was plainly no inequitable conduct on the part of the respondent in applying for the *ex parte* order. The only error committed was technical. In respect of the *inter parte Mareva* injunction order, the JC had correctly found that the test for the grant of it had been satisfied. (para 37)

Case(s) referred to:
Hong Kim Sime v. Malayan Banking Bhd [1999] 3 CLJ 731 FC ***(refd)***
Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd [1996] 3 CLJ 483 CA ***(refd)***
Re: Hong Kim Sime; Ex parte: Malayan Bank Bhd [1994] 3 CLJ 646 HC ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 128(a)
Courts of Judicature Act 1964, ss. 3, 4(1), 10(4), 11(a)
Criminal Procedure Code, s. 424
Insolvency Act 1967, s. 128
Rules of Court 2012, O. 1A, O. 2, O. 29 r. 1(2B), (2BA), O. 41 r. 4
Sabah Oaths Ordinance, s. 9
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2
Subordinate Courts Act 1948, ss. 2, 99(2), Fourth Schedule

For the appellant - Jeyan Marimuttu & Eric Chong; M/s J Marimuttu & Partners
For the respondent - Alex Decena & Jordan Christian Kong Tzu Fui; M/s Jayasuriya Kah & Co

[Editor's note: For the High Court judgment, please see Shim Yen Lin v. Cedric Wong King Ti [2021] 7 CLJ 104 (affirmed in part).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal against the dismissal of the appellant's application to discharge an *ex parte Mareva* injunction order and the grant of the *inter parte Mareva* injunction order. The said orders were granted in favour of the respondent who had obtained judgment in respect of liability against the appellant in 2015. The assessment of damages was still pending at the time the post-judgment injunction orders were granted on 11 January 2021 and 26 April 2021.

Background Facts

[2] The brief background facts are as follows. The appellant and respondent entered into an agreement to invest in a joint venture project involving prawn farming (the Pitas project). For that purpose, Sunlight Aqua Sdn Bhd was set up as the joint venture vehicle. The appellant held 51% of the shares in the company whereas the respondent held 49 % of the shares. The company managed to obtain endorsement and funding for the project from a governmental body, *ie*, the Sabah Foundation. Subsequently, the respondent sued the appellant for fraudulently setting up another company to enter into an agreement with a subsidiary of Sabah Foundation. After a

full trial, the High Court found the appellant liable for breach of contract and fraudulent concealment and ordered damages to be assessed. Judgment against the appellant was entered on 30 December 2015. The decision of High Court was affirmed by the Court of Appeal and Federal Court. The matter is now pending assessment of damages before the High Court.

Mareva Injunction Application

[3] Pending the assessment of damages, the respondent filed for a post-judgment *Mareva* injunction (encl. 140) on *ex parte* basis. The essential order sought was that the appellant must not remove from Malaysia any of his assets up to the value of RM30 million and in any way dispose of or deal with the same to diminish its value. The prohibition sought extends to monies in bank, real estate and shares in companies. The respondent also applied for disclosure of details of the assets and liabilities of the appellant in aid of the *Mareva* injunction.

[4] The grounds of the application were as follows. Judgment on liability had been entered in favour of the respondent. The appellant has assets within the jurisdiction. There is a real risk of dissipation of assets. The RM30 million upper limit in respect of assets that the appellant must not remove from Malaysia was arrived at in the following way. In the affidavit in support of the *ex parte* application, the respondent deposed that the High Court made a finding that an investor had agreed to buy 49% of the shares of Sunlight Aqua Sdn Bhd from the respondent for the said price.

Application To Discharge *Mareva* Injunction Order

[5] The learned Judicial Commissioner heard the *ex parte* application in encl. 140 and granted the *ex parte Mareva* injunction on 11 January 2021. On 26 January 2021, the appellant filed a notice of application in encl. 169 to set aside and discharge the *ex parte* injunction order. The decision of the learned Judicial Commissioner to dismiss encl. 169 and the subsequent grant of the *inter parte Mareva* injunction order on 26 April 2021 is the subject of this appeal.

[6] The main ground of appeal to discharge the *ex parte* order was that the affidavit in support was not properly affirmed as it was attested before a Justice of the Peace (JP). Apart from that ground, counsel for the appellant also raised some procedural grounds. The application for *ex parte* injunction and the unsealed copy of the order that were served on the appellant on 12 January 2021 did not have a return date. The sealed copy of the *ex parte Mareva* injunction order was not served within seven days of the order. The abovementioned grounds were also raised in the form of preliminary objections to the *inter parte* application of the respondent for the grant of the *Mareva* injunction.

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Decision Of High Court

[7] The application of the appellant to discharge the *ex parte* order and the *inter parte* application of the respondent for the *Mareva* injunction were all heard together. It must be noted that the *inter parte* application of the respondent for an *ad interim* application prior to the hearing of the setting
B aside application was supported by a fresh affidavit that was attested by a Commissioner of Oaths. The affidavit in reply of the respondent to the affidavit in support of the appellant to set aside the *ex parte* order was also attested by a Commissioner for Oaths. The learned Judicial Commissioner dismissed the application of the appellant to discharge the *ex parte* order and
C granted the *inter parte* application of the respondent for the grant of the *Mareva* injunction on 26 April 2021.

[8] His Lordship held that a JP in Sabah is empowered by law to attest affidavits. Even if it were otherwise, he said that the defect is curable under O. 2 r. 1 and is therefore admissible under O. 41 r. 4 of the Rules of Court
D 2012. In respect of the absence of a return date, the learned Judicial Commissioner noted that the initial date that was given by the court was converted to an e-review date due to the imposition of the movement control order (MCO) in 2021. He dismissed the objection of the appellant as no prejudice was occasioned. In respect of the two-day delay in the service of
E the sealed *ex parte* order, the learned Judicial Commissioner found that it was due to the imposition of the MCO and therefore dismissed it after citing O. 1A of the Rules of Court 2012.

[9] In respect of the merits of the *Mareva* injunction application, the learned Judicial Commissioner found that the appellant has a good arguable
F case and that the appellant has assets within the jurisdiction.

[10] His Lordship also found that the terms of the *ex parte* order were not onerous or oppressive as there was evidence that the respondent would have sold her share of Sunlight Aqua Sdn Bhd for RM30 million to a potential
G buyer had the "Pitas Project" not been diverted to other companies by the appellant.

Issues

[11] The notice of appeal was directed against the decision of the learned Judicial Commissioner to dismiss the application to discharge the *ex parte*
H injunction order and at the same time to grant the *inter parte Mareva* injunction order. The learned Judicial Commissioner dismissed the application to set aside the *ex parte* order for the reasons that we summarised earlier. Before us, counsel for the respondent also argued that since the *ex parte* injunction order had lapsed and fresh affidavits had been sworn before a Commissioner
I for Oaths for the *ad interim* injunction application and to oppose the setting aside application, the appeal is academic. Thus, the issues in this appeal are as follows:

(1) The main issue whether a JP in Sabah can affirm affidavits; A

(2) Whether the appeal is academic?

(3) Whether section 11 of the Courts of Judicature Act 1964 and O. 41 rr. 7 and 8 of the Rules of Court 2012 were complied with in this case; B

(4) Whether such an affidavit is wholly defective;

(5) Whether the requirements for a *Mareva* injunction were satisfied?

Whether A JP In Sabah Can Attest Affidavits?

[12] The learned Judicial Commissioner held that a JP can attest affidavits for general use in the Sabah courts. We observe that this decision is without any precedent. Thus far, the only court decision that approved the use of an affidavit attested by a JP in Sabah concerned a bankruptcy matter. The High Court and the Federal Court in that case relied on a provision of the then Bankruptcy Act 1967 to validate the said affidavit. We shall briefly discuss the said decision and reasons of the learned Judicial Commissioner to hold that an affidavit attested by a JP in Sabah can be used for general court proceedings. C D

[13] In *Re: Hong Kim Sime; Ex parte: Malayan Bank Bhd* [1994] 3 CLJ 646, the issue at hand was whether a Sabah JP was legally competent to attest an affidavit used to verify a creditor's petition. Ian Chin J firstly looked at the law that authorised affirmation of affidavits in the High Court which is s. 11 of the Courts of Judicature Act 1964 (CJA 1964). It reads as follows: E

(1) Any Registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths (subject to any limitations expressed in his appointment) may do all or any of the following things: F

(a) receive acknowledgments of married women in all cases where acknowledgments are required by law to be taken before a public officer;

(b) receive acknowledgments of recognizances of bail and bail-bonds; G

(c) administer oaths for:

(i) the justification for bail;

(ii) taking any affidavit or affirmation;

(iii) receiving and taking the answer, plea, demurrer, disclaimer, allegation or examination of any party or parties to any action; H

(iv) the examination of any witnesses upon any interrogatories or *de bene esse* or in chief or on any other occasions;

(v) swearing executors and administrators; and I

(vi) swearing persons in any action, matter or proceeding, which is pending or about to be instituted in any court in any of its jurisdictions; and

A (d) take and receive statutory declarations.

(2) The Chief Justice may make rules for the appointment, conduct, fees to be charged by and for all things appertaining to Commissioners for Oaths and persons appointed by him under subsection (1).

B **[14]** His Lordship observed that "Registrar" would include deputies and assistants. This observation is supported by s. 3 of the Courts of Judicature Act 1964. The other category of persons is a Commissioner of Oaths. Thus, His Lordship concluded that a JP is not authorised under s. 11 to attest an affidavit. However, s. 128(a) of the Bankruptcy Act 1967 (now Insolvency Act 1967) authorised a Magistrate to attest an affidavit for use in the C bankruptcy court in Malaysia. His Lordship then considered s. 4(1) of the Justices of the Peace Ordinance 1961 of Sabah which reads as follows:

Every Justice of the Peace shall be authorised and is hereby required to administer oaths and affirmations, take and receive statutory declarations and attest signatures under any written law or when otherwise required D to do so as though such Justice of the Peace were a Magistrate.

[15] It was pointed out by the learned Judicial Commissioner in the instant case that the Justices of the Peace Ordinance 1961 of Sabah was repealed by the time of the decision in the *Hong Kim Sime* case. However, we note that Ian Chin J also considered reg. 2 of the Subordinate Courts (Powers of E Justices of the Peace) (Sabah) Regulations 1990 which was made pursuant to s. 99(2) of the Subordinate Courts Act 1948 (SCA 1948). Regulation 2 is similarly worded as s. 4(1) of the Justices of the Peace Ordinance 1961. It reads as follows:

F 2. Every Justice of the Peace shall be authorised and is required:

(a) to administer oaths and affirmations;

(b) to make and receive statutory declarations; and?

(c) to attest signatures, under any written law or when otherwise required to do so as **though such Justice of the Peace were a Second** G **Class Magistrate**. (emphasis added)

[16] Ian Chin J then concluded that under the abovementioned provisions, a JP in Sabah is deemed to be a Second Class Magistrate and therefore can attest an affidavit for the purpose of bankruptcy proceedings. The Court of Appeal upheld the decision of Ian Chin J. The Federal Court also upheld the H said decision. The Federal Court judgment is reported as *Hong Kim Sime v. Malayan Banking Bhd* [1999] 3 CLJ 731. Chong Siew Fai CJ at the Federal Court held that, a JP in Sabah can administer oaths and affirmations as he or she were a Second Class Magistrate under s. 99(2) of the SCA 1948 and reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) I Regulations 1990. Therefore, under s. 128(a) of the Bankruptcy Act 1967, a JP is competent to attest an affidavit as a Second Class Magistrate.

[17] The learned Judicial Commissioner in the instant case noted that the Federal Court did not say that a JP cannot attest an affidavit in a non-bankruptcy case. His Lordship then proceeded to hold that a JP in Sabah can do so for the following reasons. Under the Fourth Schedule of the SCA 1948, an Assistant Registrar of the Subordinate Courts is an *ex officio* Second Class Magistrate. Under s. 2 of the SCA 1948, "Registrar" includes an "Assistant Registrar" of the Subordinate Courts. His Lordship then considered the general law that authorises the taking of affidavits which is s. 11 of the Courts of Judicature Act 1964. It authorises a "Registrar" to attest an affidavit. Therefore, the learned Judicial Commissioner reasoned that a JP in Sabah is empowered to attest affidavits for "any legal proceedings in the Subordinate Courts and the High Court".

Section 11 Of The CJA 1964

[18] We note that the only general provision that refers to the taking of affidavits is s. 11 of the CJA 1964. There is no general provision in the Rules of Court 2012 or its predecessor Rules of High Court 1980 or the Subordinate Court Rules 1980 that governs the taking of affidavits. There is no general provision in the SCA 1948 in respect of the attestation of affidavits either. That is the reason for the reference to s. 11 of the Courts of Judicature Act 1964 in the *Hong Kim Sime* case by the High Court and the Federal Court. In the *Hong Kim Sime* case, as we pointed out earlier, both the Federal Court and High Court had also regard to another provision, *ie*, s. 128 of the Bankruptcy Act 1967 that permits attestation of an affidavit by a Magistrate. This is the reason, the taking of an affidavit by a JP in Sabah who is deemed to be a Second Class Magistrate was held to be valid. Likewise, there may well be a provision in other laws that permits the taking of an affidavit by a Magistrate. One such law is s. 424 of the Criminal Procedure Code which provides that an affidavit used in criminal courts may be sworn before a Magistrate.

[19] Coming back to the facts of the instant case, s. 11 of the Courts of Judicature Act 1964 was cited by the learned Judicial Commissioner. His Lordship found that a JP in Sabah has the power to attest an affidavit under it for the reason he is deemed to be a Second Class Magistrate. However, we are of the view that His Lordship erred in holding that the JP can avail this provision to attest an affidavit for general use in civil proceedings for two reasons.

[20] His Lordship held that since an Assistant Registrar of the Subordinate Courts is an *ex officio* Second Class Magistrate, a JP is also an Assistant Registrar. In other words, His Lordship conflated the office of a Second Class Magistrate with that of the Assistant Registrar. We should think that he erred in doing so. The Fourth Schedule of the SCA 1948 enacts that some public officers are, by virtue of office, deemed to be First Class or Second Class Magistrates. For example, a State Secretary is an *ex officio* First Class

A Magistrate and an Assistant Registrar of the Subordinate Court is an *ex officio* Second Class Magistrate. But the schedule does not state the converse, *ie*, it does not deem that a Second Class Magistrate is also an "Assistant Registrar". Therefore, it is wrong to say that because an Assistant Registrar is an *ex officio* Second Class Magistrate, the latter is also an B Assistant Registrar. Otherwise, a First Class Magistrate would also be deemed to be a State Secretary merely because the latter is an *ex officio* First Class Magistrate. The public officers listed in the Fourth Schedule are *ex officio* Magistrates only because of a specific provision to that effect in the law.

C **[21]** However, we would hasten to add that unlike a Second Class Magistrate, a First Class Magistrate is also a "Registrar" because of s. 10(4) of the Courts of Judicature Act 1964. The said provision enacts that First Class Magistrates are also Senior Assistant Registrars of the High Court if its registry is within the local limits of their jurisdiction.

D **[22]** In our view, the second error of the learned Judicial Commissioner is this. His Lordship had regard to the definition of "Registrar" in s. 2 of the SCA 1948 which includes an "Assistant Registrar". However, the meaning of "Registrar" in s. 11 of the Courts of Judicature Act 1964 should be discerned from the Act itself. The Act limits the meaning to all ranks of E Registrars of the Superior Courts only. There is no reference to the Registrars of Subordinate Courts. In the premises, even if a JP is deemed to be an Assistant Registrar of the Subordinate Courts, he or she cannot come within the ambit of s. 11(a) of the Courts of Judicature Act 1964. But as we said earlier, a JP in Sabah is deemed to be a Second Class Magistrate for the F limited purpose of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 only. There is no provision in any law that deems that a JP is also an Assistant Registrar of the Subordinate Courts.

[23] For all the above reasons, we are of the view that a JP in Sabah who is deemed to be Second Class Magistrate cannot attest affidavits for general G use in civil proceedings unless specially authorised by law such as s. 128 of the Insolvency Act 1967.

[24] Counsel for the respondent urged us to hold that the attestation of an affidavit in support of the *ex parte* application by JP is a mere irregularity that cannot invalidate evidence. He cited s. 9 of the Sabah Oaths Ordinance H (Cap 89) that states as follows:

> No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which I such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[25] In our view, the said Ordinance cannot apply to affidavits as it only refers to oaths and affirmations administered to a witness in a judicial proceeding. Secondly, the defect question is not a mere irregularity in form as the attestation was made before an unauthorised person. For the same reason, we find it difficult to agree with counsel for the respondent that O. 2 of the Rules of Court 2012 can cure the defect. However, we find that the part of the appeal against the grant of the *ex parte* order is academic. We shall address this issue below.

Whether Appeal Against *Ex Parte* Order Is Academic?

[26] Counsel for the respondent argued that regardless of whether the affidavit to support the *ex parte Mareva* injunction is defective, the instant appeal against the grant of it is academic and therefore the appeal should be dismissed. The reason for this argument is that the *ex parte Mareva* injunction in question has lapsed and a fresh *inter parte* injunction was granted. We find merit in this argument for the following reasons.

[27] The *ex parte Mareva* injunction which is the subject of the instant appeal was granted on 11 January 2021. Order 29 r. 1(2B) provides that unless earlier revoked or set aside, an *ex parte* interim injunction shall automatically lapse 21 days from the date it was granted. In the premises, the *ex parte* order lapsed on 1 February 2021. On the same date, the respondent applied for an *ad interim* injunction on *inter parte* basis. The application was supported by a fresh affidavit sworn before a Commissioner of Oaths on 29 January 2021. An *ad interim Mareva* injunction was granted on 1 February 2021. The *Mareva* injunction was granted on 26 April 2021.

[28] As correctly pointed out by counsel for the respondent, the *ex parte Mareva* injunction order and the subsequent *inter parte ad interim Mareva* injunction and *inter parte Mareva* injunction orders are distinct and separate orders. In *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83, this court held that an *ad interim* order made after expiry of the *ex parte* injunction order is a fresh order and not an extension of the *ex parte* order. It follows that since the *ad interim Mareva* injunction order is a separate order and not an extension of the previous *ex parte* order, it is not affected by any defect in the latter order. Similarly, the *Mareva* injunction granted after full argument is also a fresh order. In the premises, the appeal against the *ex parte Mareva* injunction order is academic and, on this ground, we dismiss it.

[29] We are mindful that in the *RIH Services* case, it was stated that the court could still consider whether a lapsed *ex parte* injunction order should have been made in the first place not for the purpose of setting it aside but to determine whether damages that should be awarded. An inquiry as to damages would be ordered if there was inequitable conduct on the part of the plaintiff such as non-disclosure of material facts or misrepresentation in the application for the *ex parte* injunction. However, in the instant case, the main

A complaint is based on a technicality, *ie*, that the first affidavit in support was sworn before a JP. For this reason, we see no reason to order any inquiry as to damages in respect of the lapsed *ex parte* order.

[30] Before we proceed to consider the appeal against the *inter parte Mareva* injunction order, for sake of completeness, we observe that before the learned B Judicial Commissioner, some procedural points were argued by the counsel for the appellant. It was argued that the *ex parte Mareva* injunction order that was served on the appellant's solicitors was not endorsed with a return date. Furthermore, the sealed copy of the *ex parte Mareva* injunction order dated 11 January 2021 was not served within seven days in accordance with O. 29 C r. (2BA). The learned Judicial Commissioner dismissed the abovementioned issues raised in the form of preliminary objections and gave detailed reasons. We find it unnecessary to address the above issues at any length as the appellant did not raise them in the memorandum of appeal. In any event, we agree with the learned Judicial Commissioner who accepted the explanation D for non-compliance and delay and found that no prejudice was occasioned.

[31] Before us, the issue of delay in applying for the *Mareva* injunction as the judgment on liability was pronounced in 2015 was also raised. This ground of appeal was pleaded in the memorandum of appeal. This issue does not appear to have been addressed by the learned Judicial Commissioner. In E the instant case, it is apparent that the respondent was alerted to the risk of dissipation when she became aware of the intention of the appellant to sell 80% of his shares in Sunlight Seafood in December of 2020. The *ex parte* application was made in January of 2021. Thus, we find no merit in this ground of appeal.

F *Appeal Against Inter Parte Mareva Injunction Order*

[32] Insofar as the *inter parte* order is concerned, we are of the view that the respondent can rely on the affidavits that were attested before the Commissioner for Oaths. These affidavits refer to the contents of the earlier affidavit sworn before the JP. However, as these affidavits were properly G attested, we see no reason why the respondent could not have relied on it. In any event, the basic fact that judgment against the appellant on liability had been granted is not disputed. And in para. 32 of the affidavit in opposition, the appellant has agreed that he has entered into a sale and purchase agreement to transfer his shares in Sunlight Seafood Sabah. In the H premises, the learned Judicial Commissioner had sufficient admissible evidence before him to consider whether there was an arguable case and whether there was risk of dissipation.

[33] As we said earlier, the learned Judicial Commissioner found that the test for a *Mareva* injunction prayed had been satisfied by the respondent. The I respondent had obtained judgment against the appellant and all appeals against the said decision had been dismissed. Therefore, a good arguable case had been established by the respondent. In respect of the issue whether there

were assets within the jurisdiction, His Lordship held that the respondent had disclosed sufficient affidavit evidence to prove that fact. In respect of the crucial issue of risk of dissipation of assets, His Lordship had regard to the fact that Justice Gabriel Gumis had earlier found as a fact in 2015 that, the appellant fraudulently concealed the fact that he set up Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with a subsidiary of Sabah Foundation. For this reason, His Lordship held that the risk of dissipation could be inferred.

[34] The learned Judicial Commissioner held as follows in respect of the risk of dissipation of assets:

> Where there has been a breach of contract and dishonesty, the courts were inclined to find that there was a real risk of dissipation. *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652 and *Rosnah bt Kamarul Zaman & Ors v. Extreme Chocolate Sdn Bhd & Anor* [2010] 1 LNS 113; [2011] 7 MLJ 249 are both cases where the High Court found that as a result of the breach of contract and breach of payment terms of the settlement agreement respectively, the breaching party was held to have lacked honesty and probity. For that reason, the risk of dissipation could be inferred.
>
> ... His Lordship Judicial Commissioner Gabriel Gumis (as he then was) in his grounds of judgment dated 30 December 2015 found that the defendant had breached the contract and had fraudulently concealed the fact that he incorporated Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with Inno Resource to develop the Pitas Project.

[35] For the same reasons, we do not disagree with the finding of the learned Judicial Commissioner that there is a real risk of dissipation of assets by the appellant before the court can assess the damages payable to the respondent. We also note that in the memorandum of appeal, the appellant did not raise any ground of appeal in respect of the finding of the learned Judicial Commissioner that the respondent satisfied the test for the grant of a *Mareva* injunction.

[36] The appellant pleaded in the memorandum of appeal that the terms of the *Mareva* injunction order were "oppressive and onerous and far too wide as well as ambiguous in its terms". We find no merit in this ground of appeal for the following reasons. In *Motor Sports International Ltd & Ors v. Delcont (M) Sdn Bhd* [1996] 3 CLJ 483, this court held that where a plaintiff claims an exact sum, a *Mareva* injunction that restrains the defendant from dissipating his asset must specify an upper limit and that if does not, the order would be too wide and oppressive. In the instant case, the upper limit specified in the *Mareva* injunction order in respect of the value of assets that must not be removed from Malaysia is RM30 million. This figure was not fixed arbitrarily by the learned Judicial Commissioner in the instant case as the High Court when granting judgment on liability in 2015 made a finding that

A one Nobel Pang had agreed to buy the respondent's shares in Sunlight Aqua for RM30 million. We are also of the view that the ancillary order for disclosure of information in para. 4 of the *ex parte* order that was adopted in the *inter parte* order is not too wide or oppressive. The disclosure order was prayed in aid of the *Mareva* injunction as without it, the respondent would B have no knowledge of the assets of the appellant. Any dissipation of the assets of the appellant would render the judgment of the High Court that was rendered in favour of the respondent in 2015 nugatory. However, we shall vary para. 4 as there is no upper limit specified in respect of disclosure of assets. In the premises, we shall vary the *inter parte* order dated 26 April 2021 C to read that the extent of the disclosure by the appellant of his assets be limited to unencumbered assets to the tune of RM30 million only.

Conclusion

[37] In summary, whilst we agree with counsel for the appellant that a JP in Sabah is not authorised to attest an affidavit for use in general civil D proceedings, by operation of law, the *ex parte* order in question has automatically lapsed. Therefore, the appeal against the grant of it is academic. We find it unnecessary to consider ordering an inquiry into damages because there is plainly no inequitable conduct on the part of the respondent in applying for the *ex parte* order. The only error committed was E technical, *ie*, it was assumed based on the *Hong Kim Sime* case, a JP in Sabah could attest the affidavit in support. In respect of the *inter parte Mareva* injunction order, we were satisfied that the learned Judicial Commissioner had correctly found that the test for the grant of it had been satisfied.

[38] For all the above reasons, we dismissed the appeal subject to the F variation that disclosure of assets be limited to unencumbered assets to the tune RM30 million only. We granted costs of RM10,000 to the respondent subject to payment of allocatur.

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